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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 263

SHULIM WIXMAN, ALSO KNOWN AS SAMUEL MORRIS WIXMAN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, which was entered on May 4, 1948 (R. 44). A petition for rehearing, properly filed on June 3, 1948, within the time allowed therefor, was denied on June 5, 1948 (R. 45). The Ninth Circuit's judgment affirmed the judgment of the United States District Court for the Southern District of California, Central Division, entered February 7, 1947, denying petitioner's petition for naturalization (R. 26-27). This Court's jurisdiction to grant this, petition rests upon Section 240(a) of the Judicial Code (28 U. S. C. 347(a)).

Opinions Below

The opinion of the District Court (R. 280-290), which was delivered orally and was stipulated by the parties and ordered by the Court to constitute findings of fact and conclusions of law (R. 26, 290-291), is not reported. The opinion of the Circuit Court (R. 38-43) is reported at 167 F. (2d) 808.

Statute Involved

Section 307(a) of the Nationality Act of 1940 (54 Stat. 1142, 8 U. S. C. 707(a)) provides:

> "No person, except as hereinafter provided in this chapter, shall be naturalized unless such petitioner, (1) immediately preceding the date of filing petition for naturalization has resided continuously within the United States for at least five years and within the State in which the petitioner resided at the time of filing the petition for at least six months, (2) has resided continuously within the United States from the date of the petition up to the time of admission to citizenship, and (3) during all the periods referred to in this subsection has been and still is a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States."

Questions Presented

Whether the Circuit Court erred in upholding the District Court's conclusion that petitioner's beliefs establish a lack of attachment to the principles of the Constitution and of a favorable disposition to the good order and happiness of the United States, within the meaning of the naturalization requirements provided in Section 307(a) of the Nationality Act of 1940.

A. Whether the conclusion that belief in public, collective ownership of industry and other resources, instead of private capitalist ownership, is contrary to

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the principles of the Constitution and to a favorable disposition to the good order and happiness of the United States, constitutes an erroneous interpretation of the statutory requirements.

B. Whether a finding that petitioner believed in a change in the political structure of the United States which was inconsistent with "the principles of the Constitution," would be invalid.

Statement of the Case

Proceedings

Petitioner filed a petition for naturalization under the Nationality Act of 1940 in the United States District Court for the Southern District of California (Central Division) on September 25, 1945 (R. 1-4).[1] After a hearing upon the petition on January 24 and 31, 1947, the District Court sustained the naturalization examiner's objections to petitioner's naturalization, and on February 5, 1947, denied the petition on the ground that petitioner had failed to "establish his burden of proof of attachment to the principles of the Constitution of the United States and a favorable disposition to the good order and happiness of the United States" (R. 26-27).

Facts

Petitioner immigrated to the United States with his mother from Russia in 1911 as a child of eleven (R. 177). While a student at Yale University he voluntarily enlisted and served in the United States Army in World War I (R. 177-178). In 1918, during his Army service, in pursuance of a modified procedure for naturalization offered to

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[1] The petition was filed under Section 310(a) [8 U.S.C. 710(a)] which reduces the residence requirement to one year's residence in the United States for aliens married to United States citizens. Petitioner was married to a native-born American citizen on June 25, 1927 (R. 1).

members of the armed forces, he engaged in a proceeding which he believed had the effect of conferring naturalization upon him (R. 178-179, 216-217, 219-220), and only found that his citizenship was not recorded when he attempted to comply with an announcement in 1941 at the commencement of World War II advising naturalized citizens to secure copies of naturalization certificates (R. 179, 216, 217, 220-222).

Petitioner has been employed for the most part since his graduation from college as a college instructor in economics.[2]

Economic Views

The major evidence as to petitioner's opinion on economic problems was a lecture delivered by petitioner during the depression, in 1934 or 1935, as an extra-curricular activity at the City College where he was then teaching (R. 190-191). This lecture began with praise of the American way of life and with petitioner's statement of his faith in the possibility of improving economic conditions and ending the then existing unemployment and scarcity in the midst of plenty (R. 5-6). After discussing the desirability of constant evaluation and re-examination of economic theories and trends and the study of new doctrines, rather than dogmatic adherence to any one school of thought (R. 6-8), petitioner described the resources of the United States and the then existing depression (R. 8-13). He then dis-

[2] After graduate work with a concomitant instructorship in history at the University of California (R. 218-219) and a period of employment in religious work (R. 179), petitioner commenced teaching economics and history (R. 186) in 1929 at the Los Angeles Junior College, which thereafter became the Los Angeles City College (R. 179). He served as an Associate Instructor (R. 69) until his resignation in 1940 (R. 180). Since then he has been employed in making studies and surveys for Jewish social organizations, such as the study of personnel relations of Jewish employees which he was conducting at the time of the District Court hearing (R. 184-185). It was indicated that he would lose his employment as a result of the denial of his petition for naturalization (R. 94-95, 149-150, 216, 239).

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cussed various theories of organization of the economy, describing the booms and depressions of unregulated capitalism, the theory of state capitalism, and the basic principles of Fascism (R. 13-20). He enunciated or quoted various criticisms of state capitalism and Fascism (R. 17-20) and then referred to collectivism as the antagonist of Fascism (R. 20). He quoted the proponents of collectivism as proposing that "all resources, all lands and buildings, all manufacturing establishments, mines, railroads and other means of transportation and communication should be, not private property but the common property of all those who work" (R. 20-21). After ezplaining the theory of proponents of collectivism as to the stages through which society would pass in the development from capitalism to socialism, petitioner concluded with the statement that "study and reflection could lead one to conclude that progress, human well being—civilization in brief, definitely and decidedly has little to fear, nay, it has much to expect, from a system of genuine socialization" (R. 24).

Petitioner explained that he had not believed at the time of the delivery of this lecture that there could be a successful and permanent revival of capitalism. However, as an open-minded and serious observer of economic phenomena (R. 187-188, 207-208, 212), he was thereafter influenced by the adoption of some collectivist measures, such as the formation of producers' and consumers' cooperatives, and cooperative programs during World War II to increase production, and he now inclines to the belief, though he is not certain, that capitalism, with modifications, can and should be preserved (R. 195-196, 205, 206, 209).

Political Viewpoint and Status in the Community

Petitioner had at all times faith and confidence in the Government of the United States, believing it to be the best in the world, though capable of improvement. He has at

all times been opposed to totalitarianism, believing that the American people can and should achieve greater economic well-being through American principles, rather than through the abandonment of them. He has always believed ardently in the Bill of Rights, placing particular value, in part because of his background as an educator, upon the free exchange of ideas (R. 188, 91-92, 94-95, 115-117, 119-121, 126, 133, 148-152, 154, 160-162, 164-166).

The petitioner's witnesses included a number of teachers who had taught at the City College at the time of petitioner's employment there from 1929 to 1940 and all but one of whom were still on the faculty at the time of the hearing (R. 85-86, 112-114, 115-117, 118, 128, 131, 138, 164, 175); neighbors (R. 135, 155, 172, 175); well-established business and professional men in the community (R. 133, 145, 148-149, 160, 162, 175); members and officers of veterans' (R. 81, 81, 122, 175) and teachers' organizations (R. 79, 81, 82, 83-84, 156, 175) to which petitioner belonged; former students (R. 88-89, 140, 168-169); clerics (R. 90, 93); and his wife (R. 233). It is clear from the testimony that petitioner is a public-spirited person who participates in civic, communal and religious organizations, taking an interest in his profession and in educational problems, in current events, and in the welfare of the community (R. 80, 92, 122, 160, 179, 182, 212, 213, 214-216).[3]

Nature of Adverse Testimony

The record is barren of any evidence even tending to suggest that petitioner was a member of the Communist Party or of any organization believing in violent overthrow of the government. The question of affiliation with any such

[3] Petitioner's wife, whom he married in 1927, testified that petitioner had awakened in her a keener appreciation of the American way of life, which she, as a native-born citizen, had previously tended to take as a matter of course (R. 234, 233-235); and he had imported such an appreciation as well as his religious inclination to their son (R. 150, 212, 233-234; as to son, see also R. 81, 94, 161, 173).

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group is entirely outside the issues of this case, and the case rests solely on petitioner's beliefs and opinions.

Despite numerous efforts by the Naturalization Examiner to adduce testimony damaging to petitioner as to his economic or political views, the only testimony of a specific nature that the Government was able to elicit thereon was:

One former student of petitioner testified that petitioner "stressed collectivism" in his classes (R. 56). The witness' support for this view was that petitioner had stated as "a boy, working in a factory, that he worked at one little item all the time. He thought that was the way it should be done, and there was greater success . . . you could succeed faster, and get more work done by everyone working together, and doing a small part (R. 57). Another student maintained that petitioner was "favorable to Communism and Socialism" because he had said that if "a truck (was) going down the street with a red flag on back (because) it had a load of pipe or lumber on it, and that the newspapers, particularly the Hearst newspapers, would jump at the conclusion that the truck driver was a dirty Red. This . . . was designed to make the student believe, after all, the word 'Red' was not such a bad word, and maybe we ought to check into it a little bit and make up our own minds" (R. 68).

Other than the students, the two chief witnesses against petitioner were Professor Cruse, the head of the department in which petitioner had taught at the City College, and Professor Frankian, a fellow-instructor. Neither, however, had any actual knowledge of petitioner's beliefs. The most positive statement adverse to petitioner by Professor Cruse was elicited when the Naturalization Examiner finally resorted to a blanket question as to "Communism," as follows:

> "Q. As to Mr. Wixman's views about Communism, were they favorable or unfavorable, as you remember them? A. As a general principle I felt that Mr. Wix-

man rather favored the ideology of Communism.

Q. Is there anything that you can recall that led you to feel that? A. There is nothing other than the general opinion you get from discussing the subject with any individual." (R. 70)

But Professor Cruse admitted that in fact he knew "not at all what the political faith of Mr. Wixman is" (R. 72), and that, though he had attended some of petitioner's classes unannounced, he was unable to maintain that petitioner had espoused any particular view in his classes (R. 69-70, 72).[4]

As to Professor Frankian, all that could be elicited from him as to petitioner's views was:

"Q. Did you ever have any conversation with Mr. Wixman which involved political economic questions? A. No, not that I recall.

Q. Specifically, did you ever discuss the subject of Communism? A. No.

Q. Did anyone else ever discuss Mr. Wixman with you? A. I have had a number of students complain about him . . . It was common belief on the campus by a great many students that he was a Red. . . .

The Court: Upon what do you base that deduction you have, Professor?

The Witness: Your Honor, when they come and say, 'Well, we heard another lecture on Communism',—they might have been exaggerating, I don't know, but I am of the belief that where there is smoke there is fire. It was not from one person. It was a number of persons. If you should ask me who those people are I could not recall names ten or twelve years later, but that was my direct impression" (R. 97-98).[5]

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[4] And Mr. Cruse's statement that his and petitioner's views were out of harmony in general (R. 70) and on the question of teaching methods in particular (R. 72), is relevant in considering his possible bias against the petitioner.

[5] Although the District Court did not deem Communism even to bear on the issues of this case, the background of the use of this term in this testimony may be briefly noted: During the '30s and particularly during the depression years, there were "conservative" and "liberal" groups among both the students and faculty at the College; and the latter group

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However, this selected group of students (R. 98, 99-100) had been unable to give Professor Frankian any specific illustrations of petitioner's classroom statements that they could "get" petitioner "on" (R. 103). The same apparently was true of an American Legion investigator who had student informers (R. 106-108) and of two of the Government's student-witnesses (R. 63-64, 54-55).

Professors and students appearing for petitioner, and petitioner himself, testified that in his classes he gave a factual description of all economic theories and systems to enable the students to achieve a rounded and open-minded approach to economic questions (R. 117-118, 142-144, 169-172, 181, 187-189, 222).

The District Court's Findings of Fact, Conclusions of Law, and Opinion

With agreement of the parties, the District Court directed that its opinion constitute the findings of fact and conclusions of law (R. 26).

A large part of the opinion consisted of a reading of passages of the petitioner's lecture without any statement as to inferences to be drawn therefrom or any other comment. A reading of the passages of the lecture upon which the Court did comment in conjunction with such comments, makes it clear that its major finding of fact was:

> On the basis of the testimony of Professors Cruse and Frankian, and of those of petitioner's former students testifying against him, and on the basis of the lecture delivered by petitioner in 1934 or 1935, the Court found

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included petitioner. The "liberal" instructors, despite their inclusion of ardent anti-Communists, and despite the fact that their employment has survived continuing investigations of radical activity at the College (R. 106), were indiscriminately referred to as "Communists" by their opponents (R. 117, 120, 114, 164). It is also to be observed that the student body was less mature than that of colleges generally, since the College only included the freshman and sophomore years and the entrance requirements were relatively low (R. 76, 167).

> that during the period to which the testimony and lecture related, petitioner believed in "collectivism"; that is, the public or communal ownership and direction of industry and other resources,—and did not believe in private ownership and direction of industry by capitalists (R. 280-281, 284, 286, 290).

The Court further found that petitioner had not established that he had changed his attitude from that which he possessed at the time of his lecture, and that he was to be deemed to possess this attitude during the period in which attachment was required under the naturalization statute (R. 289).

The Court's conclusions of law were that a belief in "collectivism" is not consistent with the principles of the Constitution and a favorable disposition to the good order and happiness of the United States, and that because of petitioner's belief in "collectivism" he had not sustained his burden of proving attachment to the principles of the Constitution and a favorable disposition to the good order and happiness of the people of the United States (R. 280-281, 290).

Thus, the Court quoted petitioner's statements as to the inevitability of depressions under capitalist ownership and direction of industry; on the basis thereof, it stated its opinion that "he (the petitioner) has held out the picture of gloom . . . that it makes little difference how the processes under the Constitution shall be invoked or employed, it is a case of utter disaster . . . Shouldn't there be some note of . . . optimism . . . of steadfast adherence to the processes under which we live . . . one who holds up that sort of picture cannot be said to be well disposed toward the good order and happiness of the American people" (R. 286). Similarly, such criticism of capitalism, the District Judge indicated, showed a tendency not

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to "support . . . the government of the United States, under the Constitution" (R. 284).[6]

* * * * * * *

It is doubtful that the Court intended to find, as a basis for its judgment, that petitioner believed in the views discussed in those passages of his lecture which the Court merely read, without comment, in the course of the opinion (see further discussion in Brief, *infra*, p. 28). However, for the sake of a complete recital of all the findings which might possibly be inferred from the opinion, it is to be noted that the District Judge read in the course of it the passage of the lecture respecting the theory of the stages through which society would pass in a transition from capitalism to socialism (R. 287-288). The change from capitalism, according to the quoted theory, was to be commenced by the action of all workers and producers, whether manual or intellectual, acting as a class; society was then to go through a stage wherein there was a central governing body selected from such "workers"; through another where the governmental administration would be diffused into the hands of the "masses of workers"; and finally to the stage where all coercive governmental authority as well as wages, prices, and money was abolished and there was universal voluntary participation in a cooperative commonwealth (R. 287-288).

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[6] These comments underscore the fact that in concluding that petitioner did not fulfill the requirement of attachment because he was a believer in "collectivism" (R. 281, 290), the District Judge's focus was upon the abrogation under "collectivism" of private capitalist ownership and direction of industry. That this was the import of "collectivism" as used by the District Judge in his findings and conclusion is clear also from the District Judge's indication during the testimony of disapproval of petitioner's criticism of the capitalist tendency toward depression (R. 193-196); the thrust of the District Judge's questioning of petitioner and the former's usage therein of the term "collectivism" (R. 222, 224-225, 227-229); and petitioner's usage of the term in his testimony (R. 208-209).

Whether or not the District Judge intended to find that this passage represented petitioner's beliefs, it is indubitable that the major basis for the judgment was the finding that petitioner believed in collective ownership, as hereinabove set forth.

Opinion of the Circuit Court

In the Circuit Court the petitioner argued that the District Court's findings were not adequately supported by the evidence and that the District Court's interpretation of the statutory requirement of attachment was erroneous, particularly in view of the interpretations of that requirement in this Court's decision in *Schneiderman* v. *United States*, 320 U. S. 118. The Circuit Court, affirming the District Court's judgment, stated that the evidence as to attachment was conflicting, that the District Court had the advantage of observation of the witnesses, that petitioner's burden of proof was heavy, and that doubts were to be resolved against him (R. 42-43). The Court rejected petitioner's argument that the *Schneiderman* decision demonstrated the error of the District Court's conclusion as to the content of the principles of the Constitution within the meaning of the naturalization statute; the *Schneiderman* decision, the Circuit Court stated, was not in point because it was rendered in a denaturalization case (R. 43).[7]

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[7] In the opinion the Court mentioned that two points respecting constitutionality, which had been included in petitioner's statement of points on appeal, were without merit; and it elaborated its opinion under Point 3 of the statement, which had read, "The denial of the petition and the judgment thereon by the District Court is not supported by the evidence" (R. 41-43).

The Court also stated, without indicating its relevance, that the District Court was not required to "'find the facts specially'" under Rule 52(a) and 81(a)(2) of the Federal Rules of Civil Procedure, because the proceeding was a naturalization one rather than a civil action (R. 41-42).

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Reasons for Granting the Writ

1. The judgment at bar is based on an erroneous interpretation of the naturalization law's requirement of attachment to the principles of the Constitution and a favorable disposition to the good order and happiness of the United States. That the interpretation herein is contrary to the intent of the statute is, we believe, established by this Court's decision in *Schneiderman v. United States,* 320 U. S. 118; and we submit that the Circuit Court erred gravely in its conclusion that the *Schneiderman* decision is not in point in the instant case on the basis that that decision was rendered in a denaturalization case. While it is of course true that the ruling in the *Schneiderman* case as to the burden of proof in denaturalization proceedings does not apply in naturalization proceedings, the rulings in that case as to the content of the principles of the Constitution appear to be controlling on that question whenever the issue arises of the meaning of the naturalization statute's requirement of attachment to such principles, regardless of the nature of the proceeding. For the content of those principles, within the meaning of the naturalization law's requirement of attachment, seems to be the precise question that was decided, and necessarily decided, in the *Schneiderman* case, since the issue there was whether Schneiderman's denaturalization was warranted because at the time of naturalization he had lacked an attachment to such principles.[8] And we submit that under that decision a belief in social change of as drastic, or even of a more drastic, nature than that

[8] And it is with respect to the interpretation herein of "the principles of the Constitution" that we maintain the *Schneiderman* decision should have been applied; that is, we urge the District Court's error in the light of that decision, not in its finding from the evidence as to the content of petitioner's beliefs, but in its conclusion as to the content of the principles of the Constitution, both determinations being the complementary bases for its ultimate judgment that petitioner's beliefs showed a lack of attachment to such principles.

which petitioner was found to possess, must be held consistent with the principles of the Constitution and cannot, therefore, be deemed to indicate a lack of attachment thereto. It is again to be noted that there is no question here, as there was in the *Schneiderman* case, of membership in the Communist Party or any similar organization, but only of a belief in public and collective ownership of industry and resources in place of private capitalist ownership.

Except in the *Schneiderman* case, this Court has not ruled on the meaning of the requirement of attachment in relation to an alien's belief in economic change. But we submit that such a rigid and circumscribed approach to the "principles of the Constitution" as was taken by the lower courts herein is contrary not only to that decision but to the tenor of this Court's other pronouncements on the underlying theory and purposes of the Constitution: its essential and basic flexibility, the adaptability it envisages to changing economic and social needs, and its primary purpose of creative growth through the free exchange of ideas.

2. There are special factors which lend unusual importance to the question of whether the lower courts' interpretation of the principles of the Constitution involves a failure to follow applicable decisions of this Court. The judicial function in relation to most of the requirements for citizenship is slight since most of them have been set down by Congress in quantitative or other relatively precise terms; that here involved is one of the few which is broadly and qualitatively expressed.[9] Thus it affords one of the chief

[9] See Nationality Act of 1940, Secs. 302 to 327 (8 U.S.C. 702-727). The only other requirements which leave a broad scope for judicial construction are that of a "good moral character" (Nationality Act, sec. 307, 8 U.S.C. 707), and those based on belief in force and violence (Nationality Act, sec. 305, 8 U.S.C. 705); and the latter have only rarely been invoked. By contrast, the annotations to the requirement here in issue show the frequency with which lack of attachment is posed as an objection to petitions for naturalization.

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bases for judicial leeway with respect to grant or denial of citizenship; and if the doctrine and interpretations established by this Court in regard to this requirement are to be ignored, an area for great individual variation and expression of personal predilection is permitted, contrary to the intent of Congress, with respect to the grant or denial of citizenship. In the instant case, for example, the District Judge made no attempt to refer to any precedent or authority, and appeared to consider himself free to implement his personal view as to the desirability of admitting to citizenship an alien of petitioner's beliefs, by interpreting constitutional principle as embodying his own economic viewpoint. And it is to be borne in mind that the right to retain citizenship as against denaturalization, as well as the right to acquire it, may depend on the interpretation of the requirement of attachment to "the principles of the Constitution".

3. The importance of the right, and of the basis upon which it was denied, in the case at bar furnish additional grounds for the grant of certiorari. For a denial of citizenship, particularly to aliens who, like petitioner, are long-time residents with no home or ties other than in the United States,[10] is a grave and serious matter; not only does it involve a refusal of the various perquisites of citizenship, but it also denies the applicant the security which a citizen possesses against the possibility of the "drastic measure" of deportation,[11] which "can be the equivalent of banishment or exile." [12]

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[10] In the case of petitioner the denial is an even greater blow because he for years considered himself a citizen (See Statement of Facts, *supra*, p. 4).

[11] *Fong Haw Tan* v. *Phelan*, 333 U. S. 6, 10.

[12] *Delgadillo* v. *Carmichael*, 332 U. S. 388, 389. The value of citizenship is further aggrandized by war or the imminence of war when all aliens, and particularly enemy aliens, are customarily subject to special restraints.

Thus, the question here involved of the extent to which thought, speech, and action with respect to economic change can be indulged or must be foregone, in order for an alien to be eligible for citizenship, and in order for a naturalized citizen to be secured in his citizenship, is of obvious concern to the three million aliens and the seven million naturalized citizens in this country, and their families. But the interpretation and application of the requirement here involved is of importance not only to this large segment of the population, but to the whole of the body politic; for an active-minded and alert population with serious concern for methods of resolving social problems would seem to be an essential foundation of our democracy. If attachment to "the principles of the Constitution" is interpreted or applied so as to preclude belief in social change, the political life of our country will be deprived of the addition by naturalization of forward-looking aliens; and vigorous and independent thought will be discouraged on the part both of alien and citizen. And freedom to believe in a change which may at a given time or in the foreseeable future in fact be undesirable and unconstitutional is an inescapable concomitant of bold and exploratory thought. This principle and the necessity for its preservation has been repeatedly recognized by this Court.[13] Thus, it would seem an important responsibility of this Court to establish the area of thought and opinion in which men's minds can function freely without fear of disqualification for, or loss of, citizenship. To this end this Court must distinguish, for the purposes of the naturalization law, between the enduring and intrinsic fundamentals which may be correctly termed "principles of the Constitution," and the non-essential and mutable, so that

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[13] See, for example, *Pennekamp* v. *Florida*, 328 U. S. 331, 346; *Thomas* v. *Collins*, 323 U. S. 516, 529-530; *Martin* v. *Struthers*, 319 U. S. 141, 143.

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belief will not be stultified by the judicial requirement of attachment to the latter. The renowned words of Justice Holmes are again apposite:

> ". . . a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of *laissez faire*. It is made for people of fundamentally differing views . . ." Justice Holmes dissenting, in *Lochner* v. *New York*, 198 U. S. 45, 75-76.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 263

SHULIM WIXMAN, ALSO KNOWN AS SAMUEL MORRIS WIXMAN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA

BRIEF IN SUPPORT OF PETITION

Specification of Errors

That the Circuit Court erred in upholding the District Court's conclusion that petitioner's beliefs establish a lack of attachment to the principles of the Constitution and of a favorable disposition to the good order and happiness of the United States, within the meaning of Section 307(a) of the Nationality Act of 1940.

A. That the Circuit Court erred in upholding the District Court's conclusion that a belief in public or collective ownership of industry and other resources, instead of private capitalist ownership, is contrary to such principles and inconsistent with such attachment.

B. That, if a finding be assumed that petitioner believed in a change in the political structure of the United States which was inconsistent with "the principles of the Constitution," such a finding would be clearly erroneous.

Point I

The Circuit Court erred in upholding the District Court's conclusion that petitioner's beliefs establish a lack of attachment to the principles of the Constitution and of a favorable disposition to the good order and happiness of the United States, within the meaning of Section 307(a) of the Nationality Act of 1940.

A. *The Conclusion that a Belief in Public or Collective Ownership Is Inconsistent with the Principles of the Constitution and a Favorable Disposition to the Good Order and Happiness of the United States.*

Assuming arguendo the validity of the District Court's finding that petitioner believed in the public or collective direction and ownership of economic resources, rather than their private capitalist ownership, we submit that the conclusion that this belief was evidence of a lack of attachment to the principles of the Constitution was based on an erroneous interpretation of those principles. Application of the term "finding" to the District Court's ultimate conclusion of lack of attachment, as was done by the Circuit Court, does not of course alter the fact that that determination embodies a conclusion of law, nor alter the duty of the reviewing court to reach its own decision thereon and to reverse the judgment if it deems that conclusion of law erroneous. See *United States* v. *United Gypsum Co.*, 333 U. S. 364, 394; *United States* v. *John J. Felin*, 68 S. Ct. 1238, 1246 (decided by this Court, June 14, 1948).

The Applicability of the Schneiderman Decision and Its Ruling as to Collectivism and the Principles of the Constitution.

The erroneous nature of the lower court's conclusion respecting the principles of the Constitution is, we believe, indisputably established by the *Schneiderman* decision. In that case the question was whether Schneiderman should be denaturalized on the ground that he had at the time of naturalization failed to meet the naturalization requirement of attachment to the principles of the Constitution; the major basis for reversal in the *Schneiderman* case of the lower courts' judgment of denaturalization was this Court's rulings as to the content of the "principles of the Constitution" within the meaning of the naturalization law. While this Court also ruled on the burden of proof with respect to the content of the beliefs of the petitioner for naturalization, and we freely concede that this rule applies only to denaturalization proceedings and not to naturalization, it seems obvious that the meaning of the statutory phrase—the "principles of the Constitution,"—is the same whenever the question of attachment to such principles within the meaning of the naturalization law is in issue, regardless of the nature of the proceeding. But rather than refer solely to the logic of the matter, we can also refer to numerous statements in the *Schneiderman* opinion, showing that the circumstance that the proceeding was for denaturalization was not, and could not have been, a factor in the rulings as to the content of "the principles of the Constitution"; that there is no basis for restricting such rulings on this score; and that the question of the proper interpretation of "the principles" was decided, and necessarily decided, for the purpose of any proceeding in which the statutory requirements for naturalization are in issue.

Thus, the Court said, in introducing its discussion of "the principles of the Constitution":

> "When petitioner was naturalized in 1927 . . . it was to 'be made to appear to the satisfaction of the court' of naturalization that immediately preceding the application, the applicant 'has (been) . . . attached to the principles of the Constitution of the United States and well disposed to the good order and happiness of the same.' Whether petitioner satisfied this . . . requirement is the crucial issue in this case. To apply the statutory requirement of attachment correctly to the proof adduced, it is necessary to ascertain its meaning." (320 U. S. at pp. 132-133)

In then seeking to determine the meaning of the requirement, the Court, after discussing whether the statute created a test of behavior or a test of belief, felt constrained to adopt the latter test because in *United States* v. *Schwimmer*, 279 U. S. 644, and *United States* v. *MacIntosh*, 283 U. S. 605, *both naturalization cases*, "it was held that the statute created a test of belief" (320 U. S. at p. 135). Then, in discussing what beliefs were to be deemed to show lack of attachment to the principles of the Constitution, the Court used this language:

> "Our concern is with what Congress meant to be the area of allowable thought under the statute . . . it is not to be presumed that Congress intended *to offer naturalization* only to those whose political views coincided with those considered best by the founders . . ." (320 U. S. at p. 139; italics added).

Finally, at the end of its delineation of possible beliefs, the Court determined which of these beliefs Congress "intended" to require by "the general test of 'attachment'" (320 U. S. at p. 158).

Thus, considering it incontrovertible that the Circuit Court erred in holding that the *Schneiderman* decision was

not in point because it was in a denaturalization proceeding, we proceed to the question of the ruling in the *Schneiderman* case as to collective or public ownership of resources and the abrogation of capitalist direction and ownership. Schneiderman testified "that he . . . advocated social ownership of the means of production and exchange, with compensation to the owners" (320 U. S. at p. 127). "With regard to the constitutional changes he desired petitioner testified that he believed in the nationalization of the means of production and exchange with compensation" (320 U. S. at p. 141). On this point the Court stated:

> "It is true that the Fifth Amendment protects private property even against taking for public use without compensation. But throughout our history many sincere people whose attachment to the general constitutional scheme cannot be doubted have, for various and even divergent reasons, urged differing degrees of government ownership and control of natural resources, basic means of production, and banks and the media of exchange, either with or without compensation. And something once regarded as a species of private property was abolished without compensating the owners when the institution of slavery was forbidden. Can it be said that the author of the Emancipation Proclamation and the supporters of the Thirteenth Amendment were not attached to the Constitution? We conclude that lack of attachment to the Constitution is not shown on the basis of the changes which petitioner testified he desired in the Constitution" (320 U. S. at p. 141).

It is clear that the Court's conclusion in the above passage that Schneiderman's belief in a change to collective ownership could not be deemed to indicate lack of attachment, was not related to any factor, such as burden of proof, affecting denaturalization, as distinguished from naturalization, proceedings; since the Court is referring to beliefs Schneiderman himself admitted, the ruling was in no way based on a failure of proof as to the content of his belief.

This holding as to the failure to establish lack of attachment was instead based wholly on the complementary question of the content of the "principles of the Constitution" on the question of "nationalization of the agents of production and exchange with or without compensation" (320 U. S. at p. 142).[14]

This Court's view, in the *Schneiderman* case, as to the consistency with the principles of the Constitution of a belief in collective ownership is not an isolated or casually-pronounced position; but rather, it is firmly rooted in the Court's general opinion on the extent to which the Constitution countenances a belief in change in existing institutions. On this issue the Court stated in the *Schneiderman* opinion:

> "Article V contains procedural provisions for constitutional change by amendment without any present limitation whatsoever except that no State may be deprived of equal representation in the Senate without its consent . . . This provision and the many important and far-reaching changes made in the Constitution since 1787 refute the idea that attachment to any particular provision or provisions is essential, or that one who advocates radical change is necessarily not attached to the Constitution . . . As Justice Holmes said, 'Surely it cannot show lack of attachment to the principles of the Constitution that . . . (one) thinks it can be improved' . . . Criticism of, and the sincerity of desires to improve the Constitution should not be judged by conformity to prevailing thought because, 'if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought'." (320 U. S. 137-138)

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[14] And it is to be noted that the dissenting Justices also indicated that collectivization of resources was consistent with "the principles" if compensation was made. (See 320 U. S. at pp. 181, 194.) In the instant case, there is no indication in the findings that petitioner was deemed not to believe in such compensation and the only evidence in the record on this point is that he did (R. 209).

Thus, and this is a view to which the dissenters likewise indicated adherence,[15] the "principles of the Constitution" countenance a belief even in the abrogation of some of its explicit provisions, for one of those very principles is freedom to consider, advocate, and effect changes in the Constitution. It is only the general system of government of the United States, rather than the particulars of the social pattern at any given time, to which the naturalization law requires attachment. This view of the law's requirements was also influential in the holding in *Girouard* v. *United States*, 328 U. S. 61, overruling *United States* v. *Schwimmer*, 279 U. S. 644, and *United States* v. *MacIntosh*, 283 U. S. 605. See also *Baumgartner* v. *United States*, 322 U. S. 665.

The theories of the Constitution which this Court effectuated in interpreting the naturalization law in these cases are woven into the fabric of our law and have been expressed repeatedly both implicitly and explicitly by this Court. Recognition, as in the Schneiderman opinion, of the flexibility of the Constitution and of the importance of preserving its plasticity is so basic and pervasive that we have given currency to the ellipticism that "It is a Constitution we are expounding". For it is an instrument "setting up an enduring framework of government" to serve "for the indefinite future and in all the changing affairs of men" (Stone, C. J., in *United States* v. *Classic* 313 U. S. 299, 316). And as an adjunct and corollary of the philosophy that it is through adaptability that our Constitution and Government can endure, stands the primary premise of the Constitution "that the ultimate good desired is better reached by free trade in ideas . . ." (Holmes, J., dissenting in *Abrams* v. *United States*, 250 U. S. 616, 630).

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[15] See dissenting opinion, 320 U. S. at p. 195.

For "free discussion of the problems of society is a cardinal principle of Americanism . . ."[16]

The doctrine which has consequently evolved of the "preferred position" to be accorded to the freedoms of the First Amendment[17] confirms this Court's view in the *Schneiderman* case that it is the principle of "freedom of thought" which should be "singled out as requiring unqualified attachment" (320 U. S. at p. 144), and attests to the wisdom of the Court's reliance thereon for perspective in defining the various other "principles of the Constitution".[18]

In view of the clarity of the expression in the *Schneiderman* case of this Court's opinion as to collectivism and its

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[16] *Pennekamp* v. *Florida*, 328 U. S. 331, 346, quoted in *United States* v. *Congress of Industrial Organizations*, 68 S. Ct. 1349, 1357, at note 21 (decided by this Court, June 21, 1948).

Thus the authors of the Constitution "chose (by the First Amendment) to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance" (Black, J., in *Martin* v. *Struthers*, 319 U. S. 141, 143). And the "freedom to differ" includes "the right to differ as to things that touch the heart of the existing order." *Board of Education* v. *Barnette*, 319 U. S. 624, 642.

[17] See *Thomas* v. *Collins*, 323 U. S. 516, 529-530, as to the "preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment"; *Saia* v. *New York*, 68 S. Ct. 1148, 1151 (decided by this Court, June 7, 1948), as to the purpose of this Court to "keep the freedoms of the First Amendment in a preferred position." See also *Winters* v. *People of State of New York*, 333 U. S. 507 517, declaring that particular care must be exerted to afford procedural protection when the issue is "entwined with limitations on free expression."

[18] The principle of freedom of thought impelled the Court to draw a distinction in the *Schneiderman* opinion which, like the ruling on collectivism, was ignored in the instant case by the lower courts, between a belief which endorses immediate and specific action and one which leaves "opportunity for general discussion and the calm processes of thought and reason" (*Schneiderman* v. *United States*, 320 U. S. at pp. 517-518). The circumstance that petitioner's belief in collectivism fits into the latter category, with no indication in the findings that the District Court regarded his belief as calling for an immediate or specific change, is an additional factor indicating the lower courts' error in holding that his belief in collectivism was evidence of a lack of attachment.

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firm doctrinal foundation, it seems somewhat presumptuous for us to consider tangential authority establishing that public or collective ownership of resources, rather than private capitalist ownership, is consistent with the principles of the Constitution. But we may point out that the taking of private property for public use is restrained under the Constitution only by the requirements that the taking be a reasonable method of advancing a constitutional objective, and that compensation be paid; though the latter requirement is not, it would appear from the *Schneiderman* opinion, to be deemed an immutable principle of the Constitution. Granted that a general taking of private property with the intention of using it productively, either by the Federal or State governments, would not be a reasonable method of advancing any constitutional objective, and would be unconstitutional, at the present time and in the forseeable future; however, a judge's opinion to this effect at the time of a naturalization hearing cannot, as appears to have happened in the case at bar, be converted into a "principle of the Constitution" which immutably prohibits such a taking for all times and places. For:

> "There must be power in the States and the Nation to remould, through experimentation, our economic practices and institutions to meet changing social and economic needs . . . we must ever be on our guard, lest we enact our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold." Brandeis, J., dissenting, in *New State Ice Co.* v. *Leibmann*, 285 U. S. 262, 311.[19]

In summary, there is no support for the lower courts' conclusion in the case at bar that a belief in collectivism

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[19] And see the expression given to the same thought by Justice Holmes in the passage quoted *supra*, p. 17; and the recent reference to that passage and to: "The painful experience which resulted from confusing economic dogmas with constituent edicts. . . ." Mr. Justice Frankfurter dissenting in *Winters* v. *People of the State of New York*, 333 U. S. 507, 527.

is contrary to the principles of the Constitution; indeed, this conclusion is antithetical to the basic constitutional principles of growth and freedom, as well as to the square holding in the *Schneiderman* opinion.

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B. *Beliefs Respecting Democracy and Political Structure*

It cannot reasonably be inferred from the District Court's opinion that petitioner was found to possess any belief as to political change. For the sole mention in the opinion of possible changes in the governmental organization of this country, is in the passage which the District Judge read from petitioner's lecture in which is quoted a theory as to the stages which would occur in the development from capitalism to socialism. It seems clear that there was no intention on the part of the District Judge to find that this passage represented petitioner's belief, for he made no comment with respect to it in his opinion nor did he mention it in his examination of petitioner (R. 227-232); rather, the District Judge only emphasized petitioner's economic viewpoint, his belief in collective ownership and his pessimism about prosperity under capitalist ownership and direction of industry (*supra*, pp. 9-11). This omission by the District Judge must be deemed deliberate in view of repeated attempts by the Naturalization Examiner to establish that petitioner believed in change in this country's political structure (see, i.e., questioning quoted on pp. 7-8, *supra*). It would therefore seem that the reading of this passage into the opinion was due merely to the Judge's skimming through the speech, as he delivered the opinion, in order to reach petitioner's concluding sentences which showed his confidence in collectivism.

If, however, contrary to our analysis, this Court takes the view that the District Court may have intended to find

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petitioner believed in political change in addition to economic, we submit that such an interpretation of the findings affords but another ground for reversal of the judgment.

Any finding that petitioner believed in a change in our present form of political organization would require reversal as clearly erroneous, under the standard set forth in *United States* v. *United States Gypsum Co.*, 333 U. S. 364, where this Court stated:

> "Since judicial review of findings of trial courts does not have the statutory or constitutional limitations of findings by administrative agencies or by a jury this Court may reverse findings of fact by a trial court where 'clearly erroneous' . . . A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (333 U. S. at p. 395) [20]

There is not a word of testimony in the record as to any political changes which petitioner desired, and abundant testimony that he believed in the present political organization of this country, in democracy, majority rule, and the Bill of Rights (see pp. 5-6, *supra*).

As to attributing to petitioner a belief in the theory quoted in his lecture respecting possible political stages in the development from capitalism to socialism, it is to be observed that that passage of his lecture was an academic exposition of a theory which at best related to a hypotheti-

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[20] And the reviewing court is better able, and therefore freer, to evaluate the evidence when it is documentary (*Gypsum* case, cited *supra*, at p. 394), which is largely true in the case at bar, and "when the crucial issues involve mixed questions of law and fact" (*Gypsum* case, cited *supra*, at p. 396); (*United States* v. *John J. Felin*, 68 S. Ct. 1238, 1246 (decided by this Court, June 14, 1948), as they do in the instant case.

Since it is at the least uncertain, if not highly unlikely, that the District Court made a finding as to political change, the Circuit Court's general conclusion that the ultimate finding of lack of attachment was supported, cannot be deemed to corroborate a finding of a belief in political change.

cal chain of events to occur in the indefinite future. And with respect to the beliefs possessed after a lapse of years even by the authors of the quotation, its persuasiveness is lessened by the fact that it concerned a prediction merely of steps to occur prior to attaining a desired objective, and thus lacked the degree of conviction which would be presumed to inhere in the espousal of an objective itself.[21] Petitioner was, moreover, an eclectic thinker who was not closely identified with these theorists (R. 6-8, 187-188, 207-208, 212, 158). Thus the inference that petitioner believed, during the 1940's,[22] in the theory quoted in his 1934 or 1935 speech would have scant support.

But assuming this inference, the next question is whether it would furnish a basis for a finding of beliefs inconsistent with the principles of the Constitution or with a favorable disposition to the peace and good order of the United States. We submit that the most reasonable and plausible interpretation of the quoted passage—and thus the interpretation which should be adopted by this Court[23]—is that demo-

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[21] Compare *Swift and Co.* v. *United States*, 196 U. S. 375, 396, quoted in *United States* v. *Griffith*, 334 U. S. 100, 105, where Mr. Justice Holmes expounded the doctrine that the existence of the intent to bring about a forbidden result will be determinative of whether there is a dangerous probability of that result, when the acts in themselves are insufficient to show such a probability.

[22] It was assumed by the Naturalization Examiner (R. 48) that the required period of attachment for petitioner was the year prior to his filing his petition, rather than 5 years, because his petition for naturalization was filed under Section 310-a of the Nationality Act, discussed *supra*, note 1. It may be assumed in view of the District Judge's failure to comment on this point, that he proceeded on the basis of the Examiner's assumption. Petitioner accordingly assumed this interpretation of the statute, on which there appears to be a division of opinion in the lower courts, in its argument before the Circuit Court, and the point was not argued by the respondent. The Circuit Court nevertheless stated it as an obvious fact that the required period of attachment was from September 25, 1940 to February 5, 1947 (R. 40).

[23] See cases cited *supra*, note 20, as to a reviewing court's freedom to construe documentary evidence.

Petitioner was not questioned as to the meaning of this section of his speech.

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cratic processes and majority rule were to prevail throughout the transition from capitalism to socialism.[24] But even if this were only one of several equally reasonable or possible interpretations, we believe there are factors here compelling its adoption. For in view of the testimony as to petitioner's belief in democracy, the candor and lack of evasiveness of petitioner (see, i.e., R. 223-225) and his witnesses, the fact that the District Judge gave no indication of any reason to disbelieve them or of such disbelief on his part, and the absence of any substantial testimony as to petitioner's belief in any political changes (See pp. 6-9, *supra*),—in view of all these factors the District Judge was bound to accord weight to the testimony that petitioner believed in democracy. It was, therefore, incumbent upon him to adopt an interpretation of the quotation in petitioner's lecture, if it was a probable and reasonable one, which was consistent with that testimony, even assuming, *arguendo*, some other interpretation might also be possible. And the duty to give proper and careful weight to the testi-

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[24] Thus, the first stage of "'class-conscious'" action of "'all workers or producers'" to gain power (R. 288-289) does not connote the use of force, since this "class" is, by definition, the majority. As to "'the dictatorship of the masses,'" the quotation itself makes clear that this phrase refers to "control by a class, not a dictatorship in the sense of absolute and total rule by one individual" (*Schneiderman* v. *United States*, at p. 142). For the quotation clearly indicates that this "dictatorship" merely meant that a minority of the workers—who are the majority according to the definition of workers in the preceding paragraph—would "pave the way" to the next stage, which is characterized by the majority directly operating the government (R. 288). In the second stage the minority representing the workers, who are the majority, is to govern to prevent overthrow of the majority and to educate all to socialism. It is clear from the last sentence respecting the third stage that the difference between these stages does not involve the use of force but merely the circumstance of whether the government shall be centralized in the hands of a minority representing the majority or controlled directly by the majority (R. 288). These passages cannot be interpreted as envisaging force and violence except by taking terms such as "dictatorship" out of context. But even force by the majority to maintain itself in power against a rebellious minority is not anti-democratic (*Schneiderman* v. *United States*, at p. 157).

mony is here fraught with more than ordinary solemnity; here a special effort at fairness for the petitioner is required because the question being determined is "entwined with limitations on free expression,"—indeed, with one of the most important purposes of such expression: the "free expression of political views."[25]

In summary, we submit that it cannot reasonably be inferred from the District Judge's opinion that he intended to find that petitioner believed in any change in the political organization of this country; but if a finding is inferred that he believed in political change contrary to the principles of the Constitution, such a finding would be clearly erroneous and the judgment, if deemed in part dependent thereon, should for this additional reason be reversed.

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[25] See *Winters* v. *People of the State of New York*, 333 U. S. 507, 517, 518. In the last-cited passage this Court emphasized the importance of the invalidation of a restraint on the distribution of certain publications stating that though the statute only applied to "vulgar magazines," "the next may call for decision as to the free expression of political views." And see Black, J., dissenting in *Ludecke* v. *Watkins*, 68 S. Ct. 1429, 1439 (decided by this Court, June 21, 1948), stating that "the First Amendment represents this nation's belief that the spread of *political* ideas must not be suppressed" (italics added).

Finally, it is to be noted that however the theory of stages quoted in petitioner's speech be interpreted, it clearly did not call for any immediate action; thus, under the *Schneiderman* opinion it could not in any event be deemed to show a lack of attachment to the principles of the Constitution (320 U. S. at pp. 157-518). Compare *Bridges* v. *California*, 314 U. S. 252, 262-263. And though it is unnecessary for the purposes of the case at bar to press this argument, it is to be observed that if the naturalization law were interpreted so as to prohibit naturalization of those who merely discussed a change without creating "a clear and present danger" of effecting it, a serious question as to the constitutionality of the law would be raised. For if it was so interpreted, the law would force the alien to forego his constitutional right to free speech in order to establish his eligibility for naturalization. Thus conditioning his right raises a constitutional question. Compare *Frost* v. *Railroad Commission of California*, 271 U. S. 583, 594; *Hague* v. *C.I.O.*, 307 U. S. 496, 515; *Murdock* v. *Pennsylvania*, 319 U. S. 105, 110-111. And see Justices Murphy and Rutledge concurring in *Oyama* v. *State of California*, 332 U. S. 633, 664.

C. *Consideration by the Circuit Court of the Question of Statutory Interpretation*

The Circuit Court gave no explicit study in its opinion to the question of the content of the principles of the Constitution and a favorable disposition to the good order and happiness of the United States, within the meaning of the naturalization law, although this question was argued at length in the District Court and in the Circuit Court by both parties, and its determination had unmistakably been a major basis of the District Court's judgment.[26] Though the Circuit Court failed to advert directly to this question, we believe it is clear that the Circuit Court considered this issue and that its affirmance, *sub silentio*, of the District Court's conclusion thereon was based on agreement therewith.

In the first place, it is to be assumed that if the Court had intended to refuse to consider the question which was paramount in the case and had been argued extensively by both parties in both courts, it would have stated clearly its refusal and its reasons therefor. Secondly, it is obviously a logical impossibility to determine that the judgment of a lack of attachment to the principles of the Constitution was not wrong, as the Circuit Court stated (R. 42-43), without consideration of the nature of those principles. Furthermore, the Circuit Court waved aside the authority of the

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[26] As to the argument on this point, see (R. 241, 246-261, 266-267, 272-274; and the Circuit Court briefs which are on file with the Clerk of this Court: Appellant's brief, p. 14 (Specification of Errors), pp. 15-16, 25-36; Appellee's brief, pp. 3, 15-26; Appellant's reply brief, pp. 8-13. The District Court explicitly and pointedly made its view of the requirements of the naturalization law a major basis of its judgment; see i. e., R. 281: "What was the idea that *should* have prevailed . . ."; (R. 286); "Is that the sort of picture that *should* be presented . . . *Shouldn't* there be some note of hope . . . It seems to me there cannot be any answer to that excepting that one who holds up that sort of picture cannot be said to be well disposed . . ." (italics added).

Schneiderman case, only on the basis that it was a denaturalization rather than a naturalization case, thus indicating inferentially that it was considering the sole question upon which the authority of the *Schneiderman* case had been urged: namely, the meaning of the principles of the Constitution.[27]

Finally, there was no justification for a refusal by the Circuit Court to perform its duty of reviewing the District Court's interpretation of the naturalization statute, and such a refusal should not therefore be attributed to it. In a petition for a rehearing, which petitioner sought to assure beyond argument that the Circuit Court duly considered the question of the meaning of the principles of the Constitution, petitioner assumed the possibility, which seemed the most likely one from the opinion, that if indeed the Circuit Court intended to refuse to consider this question, its refusal was based on its construction of petitioner's Statement of Points on Appeal. But a refusal on this basis would have been entirely unjustified; it would involve a contravention of the controlling provision of the Federal Rules of Civil Procedure, would create an inconsistency with other Circuits with respect to the application of that provision, and would constitute such arbitrary and unreasonable action as to constitute a violation of due process of law.[28]

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[27] See appellant's brief, p. 26; reply brief, pp. 8-11.

[28] We believe the question of statutory interpretation is adequately covered by point 3 of the Statement of Points on Appeal, reading, "The denial of the petition and the judgment thereon by the District Court is not supported by the evidence" (R. 32). For it is obviously impossible to determine whether or not evidence supports a judgment of a lack of attachment to the principles of the Constitution without determining what those principles are. But assuming that the question of statutory interpretation was not covered by this Statement, Rule 75(d) of the Federal Rules of Civil Procedure only provides that the appellant shall file a statement of points on appeal if he does not designate the entire record as the record on appeal. Appellant (petitioner here), however, designated the entire record (R. 28). And if the statement is made obligatory in every case despite the limitation in Rule 75 as to when it is required, the purpose of Rule 75 is entirely frustrated. For the assignment of errors was elimi-

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And it is to be noted that respondent never suggested that the question of interpretation be ignored because of the Statement of Points, at no time took any cognizance of the Statement and could not conceivably have been in any way prejudiced thereby. The only other ground for the hypothesized refusal to consider the interpretation of the naturalization law, of which there is the faintest indication in the Circuit Court opinion, is the Court's supposition that the District Court was under no duty to make findings of fact (R. 42). But a refusal for this reason to review the District Court's determination of the question of law is open to the same type of objections as a refusal on the basis of the Statement of Points.[29]

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nated by the Rule, and the Statement was obviously to be substituted therefor to the limited extent that some type of assignment served a useful purpose. If, despite the Rule, a Circuit Court requires a Statement of Points even when the entire record is designated, the result will be to reinstate under another name the procedural entanglement which the Rule sought to eliminate, and to require the Statement without regard for its rationale; for under Rule 75 the purpose of the Statement clearly is to afford protection to the adversary with respect to his designation of additional parts of the record. See Ilsen & Hone, *Federal Appellate Practice as Affected by the Rules of Civil Procedure*, p. 457, printed in Federal Rules of Civil Procedure, 1947 Revised Edition (West Publishing Co.); *Mutual Benefit Health and Accident Ass'n.* v. *Snyder*, 109 F. (2d) 469, 470 (C.C.A. 6, 1940); *Boston & Maine RR.* v. *Jesionowski*, 154 F. (2d) 703 (C.C.A. 1, 1946); *Ashton* v. *Town of Deerfield Beach*, 155 F. (2d) 40, 42 (C.C.A. 5, 1946); *Keeley* v. *Mutual Life Ins. Co. of New York*, 113 F. (2d) 633 (C.C.A. 7, 1940).

There appears to be no doubt that the Federal Rules are controlling and that the Circuit Court rules must be interpreted consistently therewith. See 48 Stat. 1064, 28 U.S.C. 723-b; *Mutual Benefit Health and Accident Ass'n.* v. *Snyder*, cited *supra*. Moreover, the intent of the Circuit's Rules appears to be the same as the Federal Rules, and there are no decisions of the Circuit indicating that it would not consider a question where the entire record has been designated, merely on the basis of the Statement. As pointed out above, respondent was in no way prejudiced by the Statement of Points, and appears to have ignored them. The Court's refusal under these circumstances to consider the paramount question in the case would seem to be an unreasonable ferreting out of an invalid objection in order to avoid the judicial function.

[29] The Circuit Court stated that findings need not be made specially in a naturalization proceeding and then emphasized the terms of the District Court's ultimate finding of lack of attachment. But in a recent well-

In order to construe the Circuit Court's opinion so as to avoid these formidable grounds of attack and for the other reasons stated above, the opinion should be interpreted as expressing concurrence *sub silentio* in the District Court's interpretation of the principles of the Constitution. In any event, in view of all the circumstances as to the status of the case in the Circuit Court,[30] and the fact that the question of interpretation was undoubtedly treated as a paramount one by the parties and the District Court, and in view of the general importance of this question (see Petition, pp. 14-17, *supra*) as well as the necessity in the interests of justice of an expeditious determination of whether the denial of petitioner's right to citizenship, which has already entailed considerable hardship to him, was erroneous,—in view of all these facts, any doubt as to the Circuit Court's consideration of the interpretation of the principles of the Constitution can hardly be deemed to affect this Court's reviewing function.[31]

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reasoned opinion, the Seventh Circuit has held that findings of fact are required by the Federal Rules in a naturalization proceeding. *In re Murra*, 166 F. (2d) 605 (1948). In addition to the cases there cited by way of analogy, see *Price* v. *Johnston*, 334 U. S. 266, at 293. In any event, however, the requirement, or lack of it, for findings of fact could hardly bear on the Circuit Court's duty to review the District Court's determination of the question of law. For even if no findings were required, the interpretation of the naturalization law is not to be left to the irreviewable discretion of the District Court.

If the Circuit Court meant to indicate that it did not believe the findings were stated with adequate clarity, it should have remanded for further findings rather than attempt to foreclose petitioner from review of the District Court's statutory interpretation.

[30] Compare *Gryger* v. *Burke*, 68 S. Ct. 1256, 1257, at note 2 (decided by this Court, June 14, 1948), where this Court said that "respondent contested the case below and in this court on the merits. We assume that the Supreme Court of Pennsylvania passed on petitioner's allegations of deprivation of federal Constitutional rights . . ."

[31] Compare *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 449, and cases there cited; *Story Parchment Co.* v. *Patterson Parchment Co.*, 282 U. S. 555, 567; *N. Y. Dock Co.* v. *The Poznan*, 274 U. S. 117, 123.

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Conclusion

It is respectfully submitted that the petition for certiorari should be granted and the case remanded with directions to grant petitioner's petition for naturalization, or such other and further relief be granted as to this Court seems proper.

Respectfully submitted,

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September 1, 1948.